95-1684

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

In re MELKA MARINE, INC.,

Petitioner.

PETITION FOR AN EXTRAORDINARY WRIT

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51 pp

QUESTION PRESENTED

1. Should an extraordinary writ of mandamus be issued to the Supreme Court of Virginia to hear the appeal of Melka Marine, Inc. where the Supreme Court of Virginia dismissed said appeal on grounds that are contrary to its own precedent?

TABLE OF CONTENTS

Question Presented i

Opinion Below 1

Jurisdiction 2

Statement of the Case 3

Argument 6

Conclusion 16

Appendices A-1

Opinion of the Supreme Court of Virginia A-1

Opinion of the Trial Court A-3

Order of the Supreme Court of Virginia A-26

TABLE OF AUTHORITIES

Cases:

Blowe v. Peyton, 208 Va. 68, 155 S.E.2d 351 (1967) 13

City of Richmond v. Randall, 215 Va. 506, 211 S.E.2d 56 (1975) 15

Fox v. Curtis, 236 Va. 69, 372 S.E.2d 373 (1988) 9

Hyman v. Commonwealth, 206 Va. 891, 147 S.E.2d 156 (1966) 13

Lamb v. Commonwealth, 222 Va. 161, 279 S.E.2d 389 (1981) 7

Raintree of Albemarle Homeowners v. Jones, 243 Va. 155, 413 S.E.2d 340 (1992) 14

Roe v. Roe, 228 Va. 722, 324 S.E.2d 691 (1985). 13, 14

Smyth v. Midgett, 199 Va. 727, 101 S.E.2d 575 (1958) 13, 14

Smyth v. Morrison, 200 Va. 728, 107 S. E.2d 430 (1959) 13

Talkington v. Barnhart, 164 W.Va. 488, 264 S.E.2d 450 (1980) 10, 11

Towler v. Commonwealth, 216 Va. 533, 221 S.E.2d 119 (1976) 9

Turner v. Holloway, 146 Va. 827, 132 S.E. 685 (1926) 15

White v. Morano, Va., 452 S.E.2d 856 (1995) 8

Other Authorities:

28 U.S.C., Section 1651(a) 2

Section 8.01-679 of the Code of Virginia. 8

Rule 5:5 of the Rules of Virginia Supreme Court 11, 12

Rule 5:9(a) of the Rules of Virginia Supreme Court 12

Rule 5:9(b) of the Rules of Virginia Supreme Court (1973 version) 6

Rule 5:11 of the Rules of Virginia Supreme Court 7, 8, 12, 14

Rule 5:11(a) of the Rules of Virginia Supreme Court 5, 6, 9

Rule 5:11(b) of the Rules of Virginia Supreme Court 5, 6, 7, 12

Rule 5:11(d) of the Rules of Virginia Supreme Court 8

Rule 5:14(a) of the Rules of Virginia Supreme Court 12

Rule 5:17(a) of the Rules of Virginia Supreme Court 12

Rule 5:20) of the Rules of Virginia Supreme Court 12

Rule 5:21(c) of the Rules of Virginia Supreme Court 12

Rule 5:21(g) of the Rules of Virginia Supreme Court 12

Rule 5:39 of the Rules of Virginia Supreme Court 12

Rule 61 of the West Virginia Rules of Civil Procedure 11

Rule 80(c) of the West Virginia
Rules of Civil Procedure 11

Civil Procedure and Practice 19
U. Rich. L. Rev. 679 (1985) 7

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OPINION BELOW

The petitioner[1] seeks a petition for an extraordinary writ from a judgment of the Supreme Court of Virginia which appears in the Appendix hereto at page A-1. The subsequent Order issued by the Supreme Court of Virginia denying the petitioner's petition for rehearing appears in the Appendix hereto at page A-26.

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1. Melka Marine, Inc. is not a subsidiary or affiliate of any other company.

The Judgment Order together with the attached letter opinion of the trial court also appears in the Appendix hereto at page A-3.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on November 17, 1995. A timely petition for rehearing was filed on December 1, 1995; an Order denying the petition for rehearing was entered on January 19, 1996. This petition for an extraordinary writ was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1651(a). The petitioner has also filed this date a petition for writ of certiorari from the Supreme Court of Virginia. Petitioner respectfully requests that this Supreme Court of the United States issue a writ of mandamus to the Supreme Court of Virginia to hear the appeal of Melka Marine, Inc., that was dismissed on November 17, 1995. The granting of this writ will be an aid to this Supreme Court of the United States in that the same will not required this Supreme Court of the United States to grant the petition for writ of

certiorari from the Supreme Court of Virginia filed this date. The denial of petitioner's rights to due process warrant the exercise of this Supreme Court's discretionary powers. The petitioner believes that adequate relief cannot be obtained in any other form or from any other court.

STATEMENT OF THE CASE

This action arises from a construction contract wherein the Town of Colonial Beach failed to pay monies due to Melka Marine, Inc. The jury heard the issues of whether the Town was required to pay the contract balance and attorney's fees pursuant to the contract and also whether Melka Marine, Inc. was liable for various counterclaims asserted by the Town. The jury found that the Town was liable to Melka Marine, Inc. for the contract balance and attorney's fees and that Melka Marine, Inc. was not liable to the Town for any of the Town's counterclaims against Melka Marine, Inc. After the jury rendered a verdict on April 17, 1995, the trial court entered judgment for Melka Marine, Inc. for the entire contract balance.

Surprisingly, the trial court set aside the jury's award for attorney's fees and entered judgment for zero dollars for attorney fees for Melka Marine, Inc. even though the jury found Melka Marine, Inc. entitled to attorney's fees. The Town's motion to strike award of attorney's fees after the jury rendered a verdict for attorney's fees was in effect a motion for judgment not withstanding the verdict.

The trial court also assessed sanctions against Melka Marine, Inc. and its counsel, Peter Paul Mitrano, in the sum of $30,000.00 without an evidentiary hearing through a letter dated May 24, 1995 and received by the Town on June 5, 1995. One of the reasons given for the sanctions that were assessed against Peter Paul Mitrano involved an incident where the Town's attorney was kicking a witness under the table during a deposition. Because there was not an evidentiary hearing related to said sanctions, there is no requirement for the transcript to be part of the record in order for the Supreme Court of Virginia to consider the assignment of error related to said sanctions. The petitioner contends that the trial court clearly committed error

in assessing sanctions in the sum of $30,000.00. It would be a grave injustice and denial of due process to allow said sanctions to stand. Melka Marine, Inc. refers to its petition for writ of certiorari from the Supreme Court of Virginia filed this date for additional background as to this action. On November 17, 1995, the Supreme Court of Virginia dismissed the appeal of Melka Marine, Inc. stating:

> "Finding that the appeal was not perfected in the manner provided by law the Court dismisses the petition for appeal filed in the above-styled case. Rule 5:11(b)."

Melka Marine, Inc. contends that when certain parts of the transcript were filed in the clerk's office of the trial court in accordance with Rule 5:11(a)of the Rules of Virginia Supreme Court, said transcript became part of the record.

Melka Marine, Inc. also took the position before the Supreme Court of Virginia that arguendo, even if the Supreme Court of Virginia were not to allow said transcript to be utilized in the appeal, the Supreme Court of Virginia was still able to consider the appeal based upon the

record from the trial court. As Melka Marine, Inc. advised the Supreme Court of Virginia, the dismissal of petitioner's appeal before the Supreme Court of Virginia is too harsh a sanction and contrary to the interest of justice.

ARGUMENT

Melka Marine, Inc. timely filed an appeal before the Supreme Court of Virginia. Melka Marine, Inc. also timely filed certain transcripts with the office of the clerk of the trial court on August 22, 1995. The Supreme Court of Virginia dismissed Melka Marine's appeal based upon Rule 5:11(b) of the Rules of Virginia Supreme Court. The petitioner will first address the issue of whether said transcripts became part of the record and then address the issue of whether the Supreme Court of Virginia properly dismissed petitioner's appeal.

The petitioner contends that in accordance with Rule 5:11(a), the transcripts became part of the record when the transcripts were filed in the office of the clerk of the trial clerk within 60 days after entry of judgment. Rule 5:11(a) states:

> "(a) Transcript. -- The transcript of any proceeding is a part of the record when it is filed in the office of the clerk of the trial court within 60 days after entry of judgment."

Hence, when the petitioner filed the transcript in the office of the clerk of the trial court, the transcript became part of the record. The petitioner also refers to the law review article "Civil Procedure and Practice" 19 U. Rich. L. Rev. 679, 695 (1985) wherein Professor Bryson stated:

> "The most important change is in making a transcript a part of the record. Rule 5:11 provides that this is Bone simply by filing the transcript in the office of the clerk of the circuit court. Filing must occur within sixty days after the entry of the final order ...." (Emphasis added.)

The purpose of Rule 5:ll(b) is to allow for the correction of errors to the transcript. Rule 5:11 is not the only procedure for correcting errors in the transcript. *Lamb v. Commonwealth*, 222 Va. 161, 279 S.E.2d 389 (1981). Counsel for the Town was provided written notice of the filing of the transcript via telecopier on August 31, 1995, four days after the five days provided for in Rule 5:ll(b)

or two days after the time provided if Saturday and Sunday are excluded. The Town has not even suggested that the Town was prejudiced by receiving the notice of filing the transcript on August 31, 1995. Moreover, the Town did not file any objections to the transcript. Arguendo, even if the Town had filed objections to the transcript, and further even if the trial court filed the record late, there still would not been grounds for dismissing the appeal before the Supreme Court of Virginia. See Section 8.01-679 of the Code of Virginia which states that "no appeal shall be refused or dismissed for failure to deliver the record within the required time." Furthermore, the Supreme Court of Virginia recently decided in *White v. Morano*, Va., 452 S.E.2d 856 (1995) that the word "shall" in subparagraph (d) in Rule 5:11 is directory in meaning and not mandatory; the Supreme Court of Virginia stated that:

> "Use of the word `shall' in paragraph (d) is merely directory in meaning and not mandatory. Courts endeavoring to arrive at the meaning of language in statutes and procedural rules often are compelled to construe `shall' as permissive in

> accordance with the subject matter. Fox v. Curtis, 236 Va. 69, 77, 372 S.E.2d 373, 377 (1988)." *Id.*, at 452 S.E.2d 859.

Under the former Rule 5:9(b) which differs from the present Rule 5:11(a) in that the former Rule 5:9(b) required the notice of filing the transcript to be filed in order for the transcript to become part of the record, the Supreme Court of Virginia decided *Towler v. Commonwealth*, 216 Va. 533, 221 S.E.2d 119 (1976). It is important to realize that *Towler* was predicated upon the former Rule 5:9(b) of the Rules of Virginia Supreme Court which required a notice to be accompanied by the transcript in order for the transcript to become part of the record. Please note that the current Rule 5:11(a) of the Rules of Virginia Supreme Court differs from the language of the former Rule 5:9(b) of the Rules of Virginia Supreme Court and does not require a notice to accompany the transcript in order for the transcript to become part of the record. The former Rule 5:9(b) of the Rules of Virginia Supreme Court upon which the decision in *Towler v. Commonwealth*, supra, was decided stated:

> "(b) The transcript of any hearing also becomes a part of the record when it is filed in the office of the clerk within sixty days after entry of final judgment and is accompanied by a notice identifying the transcript and reciting its delivery to the clerk, to which is appended a certificate that a copy of the notice has been mailed to opposing counsel or acceptance of service of such notice by opposing counsel."

The Supreme Court of West Virginia has addressed the issue of the notice of filing of the transcript. See *Talkington v. Barnhart*, 164 W.Va. 488, 264 S.E.2d 450 (1980) wherein the Supreme Court of West Virginia stated the intent of the West Virginia Rules of Civil Procedure was to avoid "placing form over substance" and held that the failure to give notice of the filing of a transcript will be deemed a harmless error under their rules unless the other party can show actual prejudice affecting substantial rights. In *Talkington v. Barnhart, supra*, the court stated:

> "Defendant moved that we dismiss the appeal He argued that plaintiffs' counsel's failure to notify him that the trial transcript had been made

> part of the record as required by West Virginia Rules of Civil Procedure, Rule 80(c), precludes us from reviewing the testimony to determine the merits of the appeal. We do not grant the motion ... We modify Syllabus Point 3: '[i]n the interpretation and application of Rule 80(c) of the West Virginia Rules of Civil Procedure, the function and purpose thereof must be considered' but failure to comply with the rule will be deemed harmless under Rule 61 unless a party can show actual prejudice effecting substantial rights." *Id.*, at 264 S.E.2d 451.

Rule 80(c) of the West Virginia Rules of Civil Procedure as quoted in *Talkington v. Barnhart*, supra, stated:

> "(c) Notice of filing transcript.-- When a transcript of the proceedings had and testimony taken at a trial is filed with the court, the party causing it to be filed shall promptly give notice thereof to all other parties." *Id.*, at 264 S.E.2d 452.

Furthermore, Rule 5:5 of the Rules of Virginia Supreme Court specifically lists the times which are mandatory as follows:

> "The times prescribed for filing the notice of appeal (Rules 5:9(a), 5:14(a) and 5:21(c)), the transcript or written statement (Rule 5:11), a petition for appeal (Rules 5:17(a) and 5:21(g)) and a petition for rehearing (Rule 5:20 and 5:39), are mandatory."

Note that the above-quoted Rule 5:5 does not state that the time for filing the notice of filing of the transcript is mandatory.

Melka Marine contends that the Supreme Court of Virginia should have decided Melka Marine's appeal on the merits and should not have dismissed the appeal for failing to strictly adhere to the five-day rule in Rule 5:ll(b) especially when the Town was not prejudiced.

The second issue is, arguendo, the Supreme Court of Virginia should still not have dismissed the appeal because the record is sufficient for the Supreme Court of Virginia to decide this appeal without said transcript. The Supreme Court of Virginia has repeatedly held that when the record is sufficient to decide the issues raised on appeal even without a transcript, the Supreme Court opponents should decide the appeal on the merits and not dismiss the appeal. For example, in

Smyth v. Midgett, 199 Va. 727, 729, 101 S.E.2d 575, 578 (1958), the Supreme Court of Virginia overruled a motion to dismiss and stated:

> ". . . But this Court will consider any question of law properly raised as to matters appearing on the face of the record. In this case the record consists of the pleadings, exhibits filed therewith and the orders of the lower court, which record is sufficient for the Court to pass on the question of law raised by respondent. . . ."

In *Smyth v. Morrison*, 200 Va. 728, 107 S. E.2d 430, 432 (1959), the Supreme Court of Virginia overruled a motion to dismiss and stated:

> ". . .It thus appears that the proceedings in that court were based solely upon matters of law. The writ of error, therefore, presents only questions of law. Such of these as were properly raised as to matters appearing on the face of the record we are required to determine."

Also see *Hyman v. Commonwealth*, 206 Va. 891, 147 S.E.2d 156 (1966); *Blowe v. Peyton*, 208 Va. 68, 155 S.E.2d 351 (1967); *Roe v. Roe*, 228 Va.

722, 725, 324 S.E.2d 691, 692 (1985). Even in a fairly recent decision, this Court held in *Raintree of Albemarle Homeowners v. Jones*, 243 Va. 155, 157, 413 S.E.2d 340, 341 (1992), that an appeal should not be dismissed even though the appellant failed to file a transcript when the record was sufficient for this Court to consider the legal issues raised in the appeal and stated that:

> "Citing Rule 5:11, Charles and Glenda Jones contend that the Homeowners Association's appeal should be dismissed because it failed to file a transcript with this Court. We disagree. In this case, the record consists of the pleadings, exhibits filed during the ore tenus hearing, orders of the trial court and its letter opinion. Even though the Homeowners Association did not file a transcript of the ore tenus hearing, the findings of fact upon which the chancellor relied are contained in his opinion. Therefore, we hold that the record is sufficient to permit this Court to consider the legal questions raised in this appeal. See Smyth v. Midgett, 199 Va. 727, 729, 101 S.E.2d 575, 578 (1958)."

In *City of Richmond v. Randall*, 215 Va. 506, 508, 211 S.E.2d 56, 58 (1975), the Supreme Court of Virginia overruled a motion to dismiss an appeal based upon the trial judge's refusal to certify a statement of facts and stated:

> "...Since we find that record sufficient for adjudication of the issues presented, we overrule landowner's motion."

Also see *Turner v. Holloway*, 146 Va. 827, 132 S.E. 685 (1926). Melka Marine contends that even without the transcripts filed in the record before the Supreme Court of Virginia, a review of Petition for Appeal of petitioner dated September 23, 1995 and the record before the Supreme Court of Virginia will clearly show that the record is sufficient for the Supreme Court of Virginia to consider the legal issues raised in Melka Marine's appeal.

As a result of the Supreme Court of Virginia dismissing the appeal of Melka Marine, Inc. for a reason that is not in accord with the precedent of the Supreme Court of Virginia and further as a result of the Supreme Court of

Virginia denying Melka Marine's petition for rehearing, Melka Marine respectfully request that this Supreme Court of the United States issue a writ of mandamus to the Supreme Court of Virginia to hear the appeal of Melka Marine, Inc. Please note that Melka Marine has exhausted its available remedies with the Virginia Supreme Court.

CONCLUSION

For these reasons, an extraordinary writ should be issued by this Supreme Court of the United States.

Respectfully submitted,

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April 16, 1996